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**Date:** Tuesday, June 22, 2010 5:47 AM  
**Subject:** Army Corps declares Cargill salt ponds "waters of the U.S."

As reported below, the U.S. government has reaffirmed that Redwood City salt ponds are legally "waters of the U.S." under the federal Clean Water Act and Rivers and Harbors Act, contrary to what DMB and Cargill have argued for years.

This is not a place for development, and it should be restored to Bay wetland habitat.

DMB did not release this information to the public so Save The Bay obtained it through the Freedom of Information Act.

- David

San Jose Mercury News      Sunday June 20, 2010

Army Corps: Developers can't proceed on Redwood City bayfront project without permits <[http://www.mercurynews.com/breaking-news/ci\\_15335478](http://www.mercurynews.com/breaking-news/ci_15335478)>

By Paul Rogers

The Army Corps of Engineers has concluded that a proposal to build 12,000 homes on former Cargill salt evaporation ponds in Redwood City is subject to the strict rules of the federal Clean Water Act. The decision came in an April 14 letter to DMB, an Arizona-based developer working with Cargill. The letter became public Friday.

It means that the proposal - which would be the largest development on the shores of San Francisco Bay since Foster City was built 50 years ago - cannot be constructed unless the developers obtain a permit from the Army Corps. Typically in such cases, the Army Corps can deny projects outright, reduce their size or require that developers complete costly work to restore wetlands or other habitat elsewhere as a condition of approval.

The letter from the Army Corps became public as part of a federal Freedom of Information Act request filed by Save the Bay, an environmental group that opposes the plan. The organization on Friday hailed the finding as a setback for the project. "It's pretty much the highest possible legal hurdle to getting approval for their massive project," said David Lewis, executive director of Save the Bay. Development does receive permits under Clean Water Act rules, he noted. "But it's much more difficult than if the Corps hadn't made this determination," Lewis said.

DMB officials said the finding is not a setback at all for their efforts to recast the 1,436-acre vacant parcel east of Highway 101 next to the Port of Redwood City into a new community of up to 25,000 residents, with roughly half the land converted into wetlands, parks and sports fields. David Smith, vice president of regulatory affairs for DMB, noted that his company sent a letter to the Army Corps in November asking it to make the ruling as a way to help streamline the process. "We believe this is the most proactive, solution-driven way to work with the agencies to bring about the best future for the site," Smith said. "We started this. We asked for it."

Although the laws involved in this situation are arcane and complicated, millions, if not billions, of dollars - not to mention the future of San Francisco Bay's shoreline - depend on the way they are interpreted. The Clean Water Act, passed by Congress in 1972, limits developers from dredging or filling in "waters of the United States." Those include streams, lakes, bays and wetlands. For years, Cargill has vociferously argued that its thousands of acres of salt ponds around the South Bay - including the Redwood City site - are not "waters of the United States." Cargill's properties are worth more if the designation does not apply because they could be filled and developed into housing more easily.

Environmentalists have argued the ponds are "waters of the United States" subject to the Clean Water Act's jurisdiction because they were once part of the bay and could be restored to tidal marshes. They also cite the Rivers and Harbors Act of 1899. Still in effect today, that law limits altering navigable waters of the United States and defines them as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce." The sloughs and wetlands of the Redwood City site were first converted to salt evaporation ponds in 1901, although parts of the property remained as wetlands into the 1940s.

On Friday, Smith said DMB and Cargill still believe the Redwood City land is not subject to the jurisdiction of the Clean Water Act. Rather, he said, DMB and Cargill are acknowledging a nuance - that only their current project is subject to its rules. The reason, he said, is to avoid a court battle that could take years. "We could fight it out and go to court and spend a lot of time," Smith said. "But we think this 50-50 plan is so strong that even if the Corps were to treat it as jurisdictional, we still think they can issue us a permit."

Smith said that because the plan would create hundreds of acres of new wetlands, that will help secure the Clean Water Act permit. The top

lawyer for the Army Corps office in San Francisco said Friday that DMB did in fact ask for her agency to issue what is called "preliminary jurisdictional determination." But Merry Goodenough said DMB's interpretation that the finding only applies to this project is incorrect. "We don't do a determination on the project. We do it on the land," she said.

DMB can withdraw the request at any time, she noted, and it is re-evaluated every five years. So the ultimate question of whether this land or the rest of Cargill's property is covered under the Clean Water Act and the Rivers and Harbors Act remains unsettled law. DMB submitted an application to Redwood City last year. Work on an environmental impact study is just beginning and could take two years. After that, the Army Corps will consider a permit.

Just asking for a preliminary ruling, Goodenough said, is something new from Cargill. "It certainly is a change in position," she said. "They are conceding they have to apply for a permit."

[http://www.mercurynews.com/bay-area-news/ci\\_15336197?](http://www.mercurynews.com/bay-area-news/ci_15336197?)